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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. TODD ARCOLEO, Defendant and Appellant.	H037707 (Monterey County Super. Ct. No. SS082664A)

In 2008, appellant Todd Arcoleo pleaded no contest to one count of attempted grand theft from the person of another. (Pen. Code, § 664/487, subd. (c).) The court suspended imposition of sentence and placed appellant on probation for three years on the condition that he serve 120 days in county jail.

Thereafter, on August 31, 2011, the Monterey County probation department filed a petition pursuant to Penal Code section 1203.2 to revoke appellant's probation.

On October 21, 2011, appellant admitted that he violated his probation. On November 30, 2011, the court revoked and then reinstated appellant on probation. The court modified several conditions of appellant's probation including that he serve 365 days in county jail. Appellant filed a notice of appeal the same day.

On appeal, appellant contends that the court miscalculated his custody credits; and asserts that he was entitled to receive custody credits for the time he spent in a residential

drug treatment program. Further, appellant argues that the October 1, 2011 amendment to Penal Code section 4019 must be applied to him by virtue of the equal protection clauses of the state and federal Constitutions. Finally, appellant argues that the trial court lacked statutory authority to impose a $10 "fee" for "local crime prevention." For reasons that follow, we modify the court's November 2011 probation order, but affirm as modified.

Facts and Proceedings Below

Since this appeal arises from a guilty plea and raises no substantive issues related to the offense for which appellant was convicted, we set forth an abbreviated version of the facts underlying this case as outlined in the probation report.

On October 25, 2008, appellant tried to steal a wallet from the hands of a woman who was outside a Costco store. When the police arrived at the store they were provided with appellant's description. A Costco employee told the police that appellant had run inside a Roundtable Pizza restaurant and was inside the bathroom. Officers entered the bathroom and detained appellant. When the officers left the restaurant with appellant, the manager of the Costco store and the victim positively identified appellant as the person who tried to steal the wallet.

An officer transported appellant to the Seaside Police Department to complete the booking process.

Discussion

Miscalculation of Custody Credits[1]

After appellant violated his probation in 2011, as noted, the court reinstated him on probation. The court awarded him 181 days of presentence custody credits consisting of 121 actual days and 60 days of goodtime/worktime credits (awarded at 33%) pursuant to the versions of Penal Code section 4019 applicable to his case.

Appellant argues that the correct calculation for his actual days in custody should be 123 days. Respondent concedes the issue.

According to the probation officer's report, appellant was in custody in the Monterey County jail from October 25, 2008, until January 8, 2009 (the first period), and again from October 15, 2011, to November 30, 2011 (the second period).

By our calculation, the first period consists of 76 days, and the second period consists of 47 days. In calculating actual days in custody, "[e]ach day of custody, including the first day and the date of sentencing is counted." (*People v. Downey* (2000) 82 Cal.App.4th 899, 920.) Accordingly, appellant is entitled to 123 actual days of credit. We will order that the sentencing minutes be corrected to reflect this calculation.[2]

Custody Credits for Time Spent in Drug Treatment Programs

When the court placed appellant on probation on December 4, 2008, the court ordered that appellant participate in a drug treatment program. The probation officer recommended that appellant not receive any custody credits against "any future local jail sentence nor any future prison commitment should probation be revoked" for the time spent in residential treatment programs. However, when the court ordered that appellant

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[1] Generally, any error in the miscalculation of custody credits must be submitted to the trial court. (Pen. Code, § 1237.1.) However, since appellant has raised other issues on appeal, and resolution of the issue involves simple arithmetic, we will address his challenge. (See *People v. Acosta* (1996) 48 Cal.App.4th 411, 420 [section 1237.1 applies only when the sole issue raised on appeal involves a defendant's contention that there was a miscalculation of presentence credits].)

[2] There is no change in appellant's conduct credit calculation.

participate in a substance abuse program, the court said that it was "not going to prohibit" appellant "from obtaining credits for that at this point."

Appellant contends that when the court revoked and then reinstated his probation in 2011, the trial court erred by failing to grant custody credits for the time he spent in residential drug treatment programs.

The supplemental probation report prepared for the November 30 sentencing hearing shows that appellant "entered the Sun Street Residential Program March 8, 2009 and exited the program upon completion on June 6, 2009, and went to live with his grandparents. The defendant became a resident at the Seven Suns Sober Living Environment (SLE) in November 2009 after he relapsed and used Oxycontin. The defendant remained in the Seven Suns SLE until May 23, 2010, when it was discovered that he had left the program without notifying the probation officer. . . . [¶] On June 18, 2010 the defendant was accepted and resided at the Redwood Teen Challenge Substance Abuse Treatment program until he was discharged from the program February 6, 2011, for failing to follow the program rules."

Appellant argues that the time he spent in the Sun Street program consists of 91 days. Further, depending on the actual date in November when his residency in the Seven Suns SLE program began, he is entitled to somewhere between 175 days and 204 days of credit. Moreover, he is entitled to 234 days for the time spent in the Redwood Teen Challenge Substance Abuse program.

As a result, appellant contends that in addition to the 123 days of credit that he should have received for his time spent in the Monterey County jail, he should receive actual custody credit for somewhere between 500 and 529 days depending on the day he actually entered the Seven Suns SLE program.

Respondent counters that appellant has forfeited any challenge to the trial court's failure to award custody credits for the time spent in residential drug treatment programs

by failing to object below. The issue is not so much forfeited, but impossible for this court to resolve.

When, as here, the question presented involves a factual determination, the issue should be tendered first to the trial court. (*People v. Guillen* (1994) 25 Cal.App.4th 756, 764 (*Guillen*).) As the Fourth District stated in *People v. Fares* (1993) 16 Cal.App.4th 954, 958: "The most expeditious and, we contend, the appropriate method of correction of errors of this kind is to move for correction in the trial court."

" 'A reviewing court has inherent power, on motion or its own motion, to dismiss an appeal which it cannot or should not hear and determine. [Citation.] Section 1248 provides that the appellate court may order dismissal of any appeal which "is irregular in any substantial particular." We have found no precise authority which authorizes dismissal, or partial dismissal, of an otherwise proper appeal on the ground of availability of an adequate remedy by way of motion in the superior court. The situation is similar, however, to the failure to exhaust administrative remedies, with respect to which dismissal is appropriate. [Citations.] Where a remedy is available in a lower echelon of judicial administration, recourse to such should be required before the resort to appellate review. This is particularly true in situations, such as this, in which the remedy depends upon factual findings better determined by the lower tribunal, and [*sic*] to which the underlying record is more readily available . . . .' [Citation.]" (*People v. Wrice* (1995) 38 Cal.App.4th 767, 773 (*Wrice*).)

The resolution of the issue here resolves at least one significant factual determination. A reviewing court may disregard the dictates of section 1237.1 only if the credit issue involves "simple arithmetic," *and* the appeal raises issues other than credit issues. (*Wrice, supra,* 38 Cal.App.4th at p. 773; *Guillen, supra,* 25 Cal.App.4th at p. 764.) Here, the question of when appellant entered the Seven Suns SLE program involves more than simple arithmetic. Appellant may move the trial court for appropriate relief. As this court has stated before, "the trial court has jurisdiction to resentence a

prisoner by amending the judgment to correct its original, erroneous calculation of his presentence credits, and there is no time limitation upon the right to move the trial court to correct the sentence due to miscalculation of custody credits." (*People v. Little* (1993) 19 Cal.App.4th 449, 452.)

Anticipating that he may have forfeited review of this issue on appeal, appellant contends that he received ineffective representation at the sentencing hearing.

In order to show ineffective assistance, a defendant has the burden of establishing that: (1) trial counsel's performance fell below prevailing professional standards of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the outcome of the case would have been different. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216–218.) A reasonable probability is one " 'sufficient to undermine confidence in the outcome.' " (*Id.* at p. 218, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*).)

Nevertheless, a reviewing court need not assess the two factors of the inquiry in order; and if the record reveals that petitioner suffered no prejudice, we may decide the issue of ineffective assistance of counsel on that basis alone. (*Strickland*, *supra*, 466 U.S. at p. 697.) If it is easier to dispose of an ineffective assistance of counsel claim on the ground of lack of sufficient prejudice that course should be followed. (*Ibid.*)

Here appellant cannot show that he is prejudiced by counsel's failure to raise the issue of an award of custody credits for the time he spent in residential drug treatment programs, because as explained *ante*, he can still raise the issue in the trial court.

Accordingly, having found no prejudice to appellant we must reject his claim that he received ineffective representation at the November 2011, sentencing hearing.

Penal Code Section 4019 Credits

At the November 2011 sentencing hearing, the court awarded appellant conduct credits "at 33 percent." Defense counsel objected and "argue[d] for 50 percent credits

based on the new laws, 4019, AB109, and also equal protection." The court noted the objection for the record.

Appellant argues that an amendment to Penal Code section 4019 effective October 1, 2011, must be applied to his case by virtue of the equal protection clauses of the state and federal Constitutions.

Prior to sentencing, a criminal defendant may earn credits while in custody to be applied to his or her sentence by performing assigned labor or for good behavior. Such credits are collectively referred to as "conduct credit." (*People v. Dieck* (2009) 46 Cal.4th 934, 939 & fn. 3.)

Before January 25, 2010, conduct credits under Penal Code section 4019[3] could be accrued at the rate of two days for every four days of actual time served in presentence custody (sometimes referred to a one third time or credits calculated at 33 percent). Stats.1982, ch. 1234, § 7, p. 4553 [former § 4019, subd. (f)]; *People v. Dieck, supra,* 46 Cal.4th at p. 939 [section 4019 provides a total of two days of conduct credit for every four-day period of incarceration].)

Between January 25 and September 28, 2010, a defendant could accrue presentence conduct credit at a rate of two days for every two days spent in actual custody (sometimes called one-for-one credits or approximately one-half off a defendant's sentence) except for those defendants required to register as a sex offender, those committed for a serious felony (as defined in § 1192.7), or those who had a prior conviction for a violent or serious felony. (Stats. 2009–2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [the January 2010 amendment to § 4019, subds. (b), (c), & (f)].)

Effective September 28, 2010, section 4019 was amended again to restore the presentence conduct credit calculation that had been in effect prior to the January 2010 amendments, eliminating the enhanced credits. (Stats.2010, ch. 426, § 2.) By its express

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[3] All unspecified statutory references are to the Penal Code.

terms, the newly created section 4019, subdivision (g), declared these September 28, 2010 amendments applicable only to prisoners confined for a crime committed on or after that date, expressing legislative intention that they have prospective application only. (Stats.2010, ch. 426, § 2.)

This brings us to legislative changes made to section 4019 in 2011, as relevant to appellant's equal protection challenge. These statutory changes, among other things, reinstituted one-for-one conduct credits and made this change applicable to crimes committed on or after October 1, 2011, the operative date of the amendments, again expressing legislative intent for prospective application only.[4] (§ 4019, subds. (b), (c), & (h).) Appellant committed his crime in 2008 and was in custody during 2008 and 2009 and again in October and November 2011.

Notwithstanding the express legislative intent that the changes to section 4019, operative October 1, 2011, (hereafter the October 2011 amendment) are to have prospective application only —i.e. to crimes committed on or after the effective date of the statute, appellant contends, on equal protection grounds, that he is entitled to the reinstituted one-for-one conduct credits implemented by those changes for all his presentence custody.

Preliminarily, we note that to succeed on an equal protection claim, a defendant must first show that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836–837.)

Appellant contends that the Supreme Court's holding in *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*) is binding in this case.

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[4] These changes took place by two separate amendments. (Stats. 2011, ch. 15, § 481; Stats. 2011, ch. 39, § 53.) Section 4019 was also amended a third time in 2011, in respects not relevant here. (Stats. 2011, 1st Ex. Sess., ch. 12, § 35.)

In *Kapperman*, *supra*, 11 Cal.3d 542, the Supreme Court reviewed a provision (then-new Penal Code section 2900.5) that made actual custody credits prospective, applying only to persons delivered to the Department of Corrections after the effective date of the legislation. (*Id.* at pp. 544–545.) The court concluded that this limitation violated equal protection because there was no legitimate purpose to be served by excluding those already sentenced, and extended the benefits retroactively to those improperly excluded by the Legislature. (*Id.* at p. 545.) In our view, *Kapperman* is distinguishable from the instant case because it addressed *actual* custody credits, not *conduct* credits. Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served.

Our Supreme Court recently confirmed, "[c]redit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying retroactively a statute intended to create incentives for good behavior. *Kapperman* does not hold or suggest that prisoners serving time before and after the effective date of a statute authorizing conduct credits are similarly situated." (*People v. Brown* (2012) 54 Cal.4th 314, 330 (*Brown*).)

Although the Supreme Court in *Brown* was concerned with the January 2010 amendment to section 4019 (*Brown*, *supra*, 54 Cal.4th at p. 318), the reasoning of *Brown* applies with equal force to the prospective-only application of the current version of section 4019.

In *Brown*, the California Supreme Court expressly determined that *Kapperman* does not support an equal protection argument, at least insofar as conduct credits are concerned. (*Brown, supra,* 54 Cal.4th at pp. 328–330.) In rejecting the defendant's argument that the January 2010 amendments to section 4019 should apply retroactively, the California Supreme Court explained "the important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their

behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows." (*Brown, supra*, at pp. 328–329.)

Similarly, we reject appellant's reliance on *People ex rel. Carroll v. Frye* (1966) 35 Ill.2d 604, as cited in a footnote in *Kapperman.* (11 Cal.3d at p. 547, fn. 6.) This Illinois case, similar to *Kapperman*, dealt with actual custody, and not presentence conduct credits with which we are concerned here. Moreover, the date that was considered potentially arbitrary or fortuitous in the equal protection analysis in *People ex rel. Carroll v. Frye* was the date of conviction, a date out of a defendant's control, and not the date the crime was committed. (*People ex rel. Carroll v. Frye, supra*, 35 Ill.2d at pp 609–610.)

More importantly, in *Brown*, the Supreme Court affirmed that the October 2011 amendments to Penal Code section 4019 have prospective application only. The court noted that the defendant had filed a supplemental brief in which he contended that he was entitled to retroactive presentence conduct credits under the 2011 amendment to Penal Code section 4019. The Supreme Court stated that this legislation did not assist the defendant because the "changes to presentence credits expressly 'apply *prospectively* . . . to prisoners who are confined to a county jail [or other facility] *for a crime committed [on] or after October 1, 2011*.' (§ 4019, subd. (h), added by Stats. 2011, ch. 15, § 482, and amended by 2011, ch. 39, § 53.) Defendant committed his offense in 2006." (*Brown, supra*, 54 Cal.4th at p. 322, fn. 11.) Similarly, here, appellant committed his offense in 2008.

Even if this court were to agree that during the period of time that appellant was in presentence custody after October 1, 2011, he was similarly situated to other defendants who committed their crimes after October 1, and were in presentence custody, where, as here, the statutory distinction at issue neither "touch[es] upon fundamental interests" nor is based on gender, there is no equal protection violation "if the challenged classification

bears a rational relationship to a legitimate state purpose. [Citations.]" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1200 (*Hofsheier*); see also *People v. Ward* (2008) 167 Cal.App.4th 252, 258 [rational basis review applicable to equal protection challenges based on sentencing disparities].) Under the rational relationship test, " ' " 'a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [Citations.] Where there are "plausible reasons" for [the classification], "our inquiry is at an end." ' " ' " (*Hofsheier, supra,* 37 Cal.4th at pp. 1200–1201, italics omitted.)

We perceive such a plausible reason in this case as to the period of time appellant was in custody after October 1, 2011.

As our Supreme Court has acknowledged "statutes lessening the *punishment* for a particular offense" may be made prospective only without offending equal protection principles. (*Kapperman*, *supra*, 11 Cal.3d at p. 546.) In *Kapperman*, the court wrote that the Legislature may rationally adopt such an approach, "to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written." (*Ibid*.)[5]

In *People v. Floyd* (2003) 31 Cal.4th 179 (*Floyd*), the defendant sought to invalidate a provision of Proposition 36 barring retroactive application of its provisions for diversion of nonviolent drug offenders. (*Id.* at pp. 183-184.) The court reiterated that the Legislature may preserve the penalties for existing offenses while ameliorating punishment for future offenders in order to " 'assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written.' " (*Id.* at p. 190.) The statute before the court came within this rationale because it

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[5] In *Kapperman*, the court found that rationale inapplicable to the issue before the court. (*Kapperman, supra,* 11 Cal.3d at p. 546.)

"lessen[ed] punishment for particular offenses." (*Ibid*.) As the *Floyd* court noted, " '[t]he Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.' [Citation.]" (*Id.* at p. 191.)

"The very purpose of conduct credits is to foster constructive behavior in prison by reducing punishment." (*People v. Lara* (2012) 54 Cal.4th 896, 906.) As our Supreme Court accepted in *Brown*, *supra*, 54 Cal.4th 314, "to increase credits reduces punishment." (*Id.* at p. 325, fn. 15.)

We gather that the rule acknowledged in *Kapperman* and *Floyd* is that a statute ameliorating punishment for particular offenses may be made prospective only without offending equal protection, because the Legislature will be supposed to have acted in order to optimize the deterrent effect of criminal penalties by deflecting any assumption by offenders that future acts of lenity will necessarily benefit them.

When appellant committed his crime his ability to earn conduct credit was limited to two days for every four days of actual time served in presentence custody. (Former section 4019, Stats.1982, ch. 1234, § 7, p. 4553.)

Although the statute at issue here does not ameliorate punishment for a particular offense, it does, in effect, ameliorate punishment for all offenses committed after a particular date. By parity of reasoning to the rule acknowledged by both the *Kapperman* and *Floyd* courts, the Legislature could rationally have believed that by making the 2011 amendment to section 4019 have application determined by the date of the offense, they were preserving the deterrent effect of the criminal law as to those crimes committed before that date. To reward appellant with the enhanced credits of the October 2011 amendment to section 4019, even for time he spent in custody after October 1, 2011, weakens the deterrent effect of the law as it stood when appellant committed his crimes. We see nothing irrational or implausible in a legislative conclusion that individuals

should be punished in accordance with the sanctions and given the rewards (conduct credits) in effect at the time an offense was committed.

Finally, as respondent points out, over the past few years we have seen a series of incremental changes in conduct credit earning rates. Some of these changes have affected only those with serious felony priors and other disqualifications,[6] some only providing a benefit to those defendants free from such burdens. Overall, the Legislature has tried to strike a delicate balance between reducing the prison population during the state's fiscal emergency and protecting public safety.[7] Although such an effort may have resulted in comparable groups obtaining different credit earning results, under the rational relationship test, the Legislature is permitted to engage in piecemeal approaches to statutory schemes addressing social ills and funding services to see what works and what does not. (See *Warden v. State Bar* (1999) 21 Cal.4th 628, 649 [reform measures can be implemented one step at a time].)

Accordingly, we must reject appellant's argument that we must apply the October 2011 amendment to section 4019 to all his presentence custody in this case.

"Local Crime Prevention Fee"

When appellant was sentenced in December 2008, the court ordered that he pay "a local crime prevention fee of $10." Appellant asserts that the court did not cite any statutory authority for this "fee." However, the clerk's minutes suggest it was imposed pursuant to " '(PC 1205.4.).' " Appellant points out that the Penal Code does not contain

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[6] For instance, the January 2010 amendment to section 4019, which gave two days of conduct credit for every two days of actual custody, excluded from the enhanced credit provisions defendants having a prior conviction for a serious or violent felony, defendants who were being sentenced for a serious felony and any defendant required to register as a sex offender under section 290. (Stats. 2009–2010, 3d Ex.Sess., ch. 28, §§ 50, 62 [former § 4019, subds. (b), (c), & (f)].)

[7] The January 2010 amendment to section 4019 was enacted during a state fiscal emergency. (*Brown*, *supra*, 54 Cal.4th 314, 318.)

a section 1205.4. Accordingly, he asserts that he can discern no statutory authorization for the $10 fee; and appellant asks this court to strike the "fee."

The "fee" is in fact a mandatory fine that is imposed in certain cases. Specifically, "(a) In any case in which a defendant is convicted of any of the offenses enumerated in Section 211, 215, 459, 470, 484, 487, 488, or 594, the court shall order the defendant to pay a fine of ten dollars ($10) in addition to any other penalty or fine imposed. If the court determines that the defendant has the ability to pay all or part of the fine, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability. In making a determination of whether a defendant has the ability to pay, the court shall take into account the amount of any other fine imposed upon the defendant and any amount the defendant has been ordered to pay in restitution. [¶] (b)(1) All fines collected pursuant to this section shall be held in trust by the county collecting them, until transferred to the local law enforcement agency to be used exclusively for the jurisdiction where the offense took place. All moneys collected shall implement, support, and continue *local crime prevention programs*. [¶] (2) All amounts collected pursuant to this section shall be in addition to, and shall not supplant funds received for crime prevention purposes from other sources. [¶] (c) As used in this section, 'law enforcement agency' includes, but is not limited to, police departments, sheriffs departments, and probation departments." (§ 1202.5, italics added.)

Appellant was convicted of an *attempt* to commit one of the crimes enumerated in section 1202.5, to wit, grand theft (§ 487.) Since section 1202.5 does not state that it applies to attempts to commit any of the offenses listed in that section, we agree that the court erred in ordering appellant to pay the $10 fine.[8]

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[8] Respondent argues that appellant has forfeited any challenge to the $10 fine. "In essence, claims deemed [forfeited] on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." (*People*

Disposition

The court's November 2011 probation order is modified to reflect that appellant has 123 days of custody credit. We strike the $10 fine imposed pursuant to section 1202.5. The clerk of the court is directed to amend the sentencing minutes to reflect these changes. As so modified the court's probation order is affirmed.

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ELIA, Acting P. J.

WE CONCUR:

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MIHARA, J.

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MÁRQUEZ, J.

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v. Scott (1994) 9 Cal.4th 331, 354.) "[T]he 'unauthorized sentence' concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal. [Citations.]" (*Ibid.*) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*Ibid.*) Such is the case here.